SUPREME COURT, U.S.
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No. 97-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

EL PASO NATURAL GAS COMPANY, A DELAWARE CORPORATION; CYPRUS FOOTE MINERAL COMPANY, A PENNSYLVANIA CORPORATION; AND CYPRUS AMAX MINERALS COMPANY, A DELAWARE CORPORATION,

PETITIONERS,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,

RESPONDENTS.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where non-Indians have been sued in tribal court solely under tribal-law causes of action that have been preempted by federal law, must those parties exhaust all tribal remedies before a federal court may consider the preemption issue?

2. Where a tribal court asserts adjudicatory jurisdiction against non-Indians involving a subject over which the tribe has no regulatory jurisdiction, must those parties exhaust all tribal remedies before seeking relief in federal court?

3. Did the court of appeals improperly reverse, *sua sponte*, an injunction from which the enjoined parties had not appealed?

PARTIES TO THE PROCEEDING

All the parties in the court of appeals are identified in the caption.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

El Paso Natural Gas Company has no parent companies. Its non-wholly owned subsidiaries include:

Aguaytia Energy L.L.C.
Bear Creek Storage Company
Berkshire Feedline Acquisition L.P.
Berkshire Power Company L.L.C.
Border Gas Inc.
CAPEX S.A.
Compania Samalayuca II, S.A. de C.V.
Companias Asociadas Petroleraos S.A.
Cornerstone/Merit Joint Venture
Coyote Gas Treating Limited Liability Company
Cross Country Development L.L.C.
ECK Generating s.r.o.
El Paso Amazonas Energia Ltda.
El Paso Energy Argentina Limitada S.A.
El Paso Pakistan Power (Private) Limited
EMA Power Kft.
Energeticke Centrum Kladno s.r.o.
Energy Equity EPIC (Sengkang) Pty. Limited
Epic Energy Pty. Limited
EPIC Energy Amazon Company
EPIC Gas Transportes S.A.
Fauji Kabirwala Power Company Limited
Garvin County Pipeline

Gas de Chile S.A.
Gasoducto Transandino Argentina S.A.
Gasoducto Transandino S.A.
Gasoductos de Chihuahua, S. de R.L. de C.V.
Interenergy Company
Latin America Capital L.L.C.
MASSPOWER
Matra Powerplant Holding B.V.
Metroplex Pipeline Company L.L.C.
Mountain Creek Joint Venture
Oasis Pipe Line Company
Oletha Partners
Orange Cogeneration GP II, Inc.
Orange Cogeneration Limited Partnership
Pasotronica, S.A. de C.V.
Polk Power GP II, Inc.
Polk Power Partners, L.P.
Portland Natural Gas Transmission System
PT Energi Sengkang
SAM II Equity Funding, L.L.C.
Samalayuca Holding Partnership
Samalayuca II Management L.L.C.
Samalayuca II Management, S. de R.L. de C.V.
Sulawesi Energy Pty. Limited
Tembec Company
The Maple Gas Development Corporation
The Western Market Center Joint Venture
Triunion Energy Company
Valley Pipeline L.L.C.
Viosca Knoll Gathering Company

Cyprus Foote Mineral Company has the following parents:

Cyprus Amax Minerals Company
Cyprus Metals Company
Cyprus Specialty Metals Company

Its non-wholly owned subsidiaries are:

Minera Cyprus Amax Chile Limitada
Minera Cyprus Chile Limitada
Sociedad Chilena de Litio Ltda.

Cyprus Amax Minerals Company has no parents. Its nonwholly owned subsidiaries are:

Cyprus Amax Kansanshi PLC
Cyprus Pima Mining Company
Cyprus Plateau Mining Corporation
Kinross Gold Corporation
Las Quintas Serenas Water Co.
Millennium Fuel Services, LLC
Oakbridge Pty Limited
PT Cyprus Amax Iriana
Rio Blanco Exploration, LLC
Sociedad Contractual Minera El Abra
Sociedad Minera Cerro Verde S.A.
Yankeetown Dock Corporation

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El Paso Natural Gas Company ("El Paso"), Cyprus Foote Mineral Company, and Cyprus Amax Minerals Company (collectively "Cyprus") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, as amended (App., *infra*, 1a-23a), is not yet reported. The order of the court of appeals amending its opinion, denying the petitions for rehearing en banc, and rejecting the suggestions for rehearing en banc (App., *infra*, 24a-26a) is also not yet reported. The decisions of the district court (App., *infra*, 27a-31a and 32a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1998. Petitions for rehearing and suggestions for rehearing en banc were denied April 27, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Atomic Energy Act, as amended by the Price-Anderson Act and the Price-Anderson Amendments Act, 42 U.S.C. §§ 2012-2014, 2210, are set forth at App., *infra*, 34a-45a.

STATEMENT

1. In the Atomic Energy Act of 1954 ("AEA"), Congress found that the development and control of nuclear materials were "vital to the common defense" and that federal regulation of such materials would promote the "national interest." 42 U.S.C. § 2012(a) & (c). Accordingly, Congress established a pervasive federal regulatory program administered by the Atomic Energy Commission ("AEC") for all phases of the nuclear industry -- mining, processing, shipping, enriching, utilizing, and disposing of nuclear materials.[1] Moreover, to supplement the AEC's licensing and regulatory controls, the Price-Anderson Amendments Act of 1988 added an additional feature to the AEA: an exclusive federal-law adjudicatory framework to govern all claims of injury alleged to be caused by nuclear-related activities in the United States. *See* pages 8-10 *infra*.

2. From 1957 through 1968, El Paso Natural Gas Company ("El Paso") operated a uranium mine on land leased from the Navajo Nation and located on the tribe's reservation in northeastern Arizona.[2] El Paso operated the mine pursuant to federal regulation by, and under a license and contract with, the AEC. The AEC purchased all the mine's production under the government's Domestic Uranium Procurement Program.

In April 1995, almost thirty years after the El Paso mine had closed and its mining lease had been surrendered, Laura and Arlinda Neztsosie (the "Neztsosies") filed suit against El Paso in Navajo tribal court. The Neztsosies, members of the Navajo Nation, alleged that water in the vicinity of the

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[1] The AEC's authority has since been transferred to the Nuclear Regulatory Commission and the Department of Energy.

[2] During much of this period, the mine was operated by a wholly-owned subsidiary of El Paso, but for convenience we refer only to the parent company.

El Paso mine had become contaminated by radioactive mine wastes and had caused them personal injury. The Neztsosies alleged only claims based on Navajo common law; they did not plead federal-law claims under the Price-Anderson Amendments Act.

Believing tribal jurisdiction to be precluded by federal law, El Paso filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Arizona.[3] El Paso's complaint, and a subsequent motion for preliminary injunction, recited that the El Paso mine had been operated under pervasive AEC regulation and that the Price-Anderson Amendments Act had established the exclusive remedy for personal-injury claims arising out of nuclear-related activities. Thus, El Paso argued, the Neztsosies' tribal-law causes of action had been preempted by federal law, and the tribal court lacked subject matter jurisdiction.

The district court (Hon. Roger G. Strand) granted in part and denied in part El Paso's motion for an injunction. The court observed that "the United States has a very strong and compelling interest to assure that it operates its nuclear industry in all of its varying facets in a manner that is uniformly appropriate for all," but that the presence of tribal governments within the United States "compounds this problem" and results in a "mix of complexity." (App., *infra*, at 29a) In the district court's view, this complexity should be resolved by allowing the tribal court to hear the Neztsosies' claims based upon tribal law, but by enjoining the Neztsosies from asserting in tribal court any claims under Price-Anderson. The court declined to decide whether the tribal-law claims had been preempted by Price Anderson. (App., *infra*, at 30a)

Subsequently, in tribal court, the Navajo tribal judge denied El Paso's motion to dismiss the Neztsosies' complaint on the basis of federal preemption. The tribal court concluded

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[3] Jurisdiction was based on 28 U.S.C. §§ 1331, 1332, 1337, and 2201.

that "the Price-Anderson Act has no application to this case" and that the Neztsosies' claims, based exclusively on tribal law, could proceed. Order Denying Defendant's Motions To Dismiss, No. TC-CV-0052-95, at 13 (D.C. Navajo Nation Judicial District of Tuba City, Arizona, Oct. 9, 1996).

3. For purposes of this petition, the suit involving Cyprus is functionally identical. Cyprus is the successor of the operator of a uranium mine on the Navajo reservation that had closed in the mid-1960s. Zonnie Richards, a member of the Navajo Nation, sued Cyprus in tribal court, individually and as representative of her husband's estate, alleging wrongful death and personal injuries as a result of radioactive contamination from the mine. Cyprus counter-sued in Arizona federal court, and the result was another partial injunction by District Judge Strand, similar to the El Paso partial injunction. (App., *infra*, at 32a-33a)

4. El Paso and Cyprus both appealed the district court's refusals to enjoin the tribal-law claims, and the appeals were consolidated. The Neztsosies and Ms. Richards did not cross-appeal from the district court's injunctions that precluded them from initiating any Price-Anderson claims in tribal court.

a. A divided panel of the Ninth Circuit affirmed the district court's refusal to enjoin prosecution of tribal-law claims and, *sua sponte*, reversed the injunctions against the assertion of Price-Anderson claims in tribal court. The panel majority (Judges Pregerson and Ferguson) concluded that, under *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), a non-Indian sued in tribal court must exhaust tribal remedies before seeking relief in federal court, save in very narrow circumstances. (App., *infra*, 5a-8a) Quoting a phrase of *National Farmers*, the court stated that the decisive issue was whether the Price-Anderson Amendments Act contained an "express jurisdictional prohibition" of tribal jurisdiction over nuclear-related claims. (*Id.* 7a) Without directly challenging the holdings of other Circuits that Price-Anderson provided an exclusive federal-law

remedy for nuclear-related claims, the court concluded that it need not reach the preemption issue because the Act did not provide for exclusive *jurisdiction* in the federal courts, observing that the statute contemplated the possibility that Price-Anderson claims could be litigated in State courts. (App., *infra*, 13a, citing 42 U.S.C. § 2210(n)(2)). This Court's recent decision in *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997), which held that tribal exhaustion was not required with respect to matters over which a tribe plainly lacks regulatory jurisdiction and sovereign authority (*id.* at 1413 & 1416 n.14), was distinguished in a footnote as limited to torts arising on reservation lands that had been transferred to State control and opened to the public. (App., *infra*, 15a n.5)

As for the district court's injunction against assertion of Price-Anderson claims in tribal court, the Ninth Circuit majority noted that the Neztsosies and Ms. Richards had not appealed from that order and were asserting only claims "based on Navajo common law and . . . not implicat[ing] Price-Anderson." (App., *infra*, 9a) Nonetheless, the court of appeals *sua sponte* reversed the injunction, citing "important comity considerations" and its view that Price-Anderson contained no express prohibition on tribal jurisdiction. (*Id.*)

b. Judge Kleinfeld dissented. He recited the holdings of other Circuits that the Price-Anderson Amendments Act provided an exclusive federal-law remedy and preempted all other causes of action for nuclear-related torts. App., *infra*, 22a, citing *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854 (3d Cir. 1991) ("A claim growing out of any nuclear incident is compensable under the terms of the [Price-Anderson] Act or *it is not compensable at all*." (emphasis in original)), and *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994) (same). Judge Kleinfeld thus concluded that the tribal members' "claims for injury and death resulting from nuclear materials left over from uranium mining were Price-Anderson claims or nothing . . . ." (App., *infra*, 21a)

It followed, Judge Kleinfeld reasoned, that the tribal court lacked jurisdiction over the tribal members' claims and that exhaustion was not required. Because the tribal members were limited to Price-Anderson remedies, had failed to appeal the district court's ruling that Price-Anderson claims could not be asserted in tribal court, and were asserting in tribal court only claims that had been preempted by federal law, "there are no claims that can be made in tribal court. There can be no claim for which exhaustion in tribal court can be required." (*Id.* at 22a)

REASONS FOR GRANTING THE PETITION

Lower courts are increasingly embroiled in disputes over the authority of Indian tribes to assert sovereign powers over non-members. Although a tribe's sovereignty over non-Indians is limited (*e.g.*, *Montana v. United States*, 450 U.S. 544, 565 (1981) (stating the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers")), the doctrine of exhaustion of tribal remedies can preclude timely federal-court relief from baseless claims of tribal jurisdiction. Non-Indians sued in tribal court may have to endure years of needless, expensive tribal-court litigation before obtaining a federal-court ruling on a dispositive question of the propriety of the tribe's jurisdiction. Indeed, the question of when tribal exhaustion is required has itself become a contentious, frequently litigated matter, to the detriment of Indian and non-Indian parties alike.

In the present case, the Ninth Circuit applied a rigid and mechanical exhaustion requirement and squandered the opportunity to set one clear benchmark: where federal law has preempted tribal causes of action, exhaustion of tribal judicial remedies should not be required. As four other Circuits have recognized, the Price-Anderson Amendments Act federalized the law of torts arising from nuclear-related activities, and preempted any causes of action not sanctioned by that Act. Exhaustion of preempted tribal remedies in such

cases serves no purpose other than to delay resolution of dispositive federal issues and to frustrate the policy of preemption. This issue is important not only in the context of nuclear torts but also in a variety of other areas where Congress has adopted pervasive regulatory regimes.

In ruling as it did, the Ninth Circuit also violated both the letter and spirit of this Court's most recent ruling on tribal exhaustion, *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997). While any case can be confined to its facts, *Strate* must logically be understood as holding that exhaustion of tribal remedies is not required where it is plain at the outset that the tribe lacks substantive, regulatory authority with respect to the matter at issue. The Ninth Circuit's limitation of *Strate* to traffic accidents on State highways is unjustified and serves only to undermine this Court's efforts to inject a common-sense, functional analysis in the law of tribal exhaustion.

Finally, the Ninth Circuit's conclusion that "comity considerations" entitled it to assert jurisdiction over lower-court orders from which no appeal had been taken creates an unsettling new exception to what had previously been a clear and well-established rule of appellate jurisdiction.

I. Exhaustion Should Not Be Required Where a Tribal Cause of Action Has Been Preempted by Federal Law.

Where a tribal cause of action has been clearly preempted by federal law, tribal exhaustion makes no sense, imposes needless cost and delay (*see Strate*, 117 S. Ct. at 1416 n.14), and frustrates the federal interests served by preemption. If Congress adopts an exclusive federal-law remedy in order to ensure substantive and procedural consistency and the availability of a federal forum, a requirement of tribal exhaustion undermines the statutory purpose. Indeed, in such cases, exhaustion violates the logic underlying preemption: Because the federal preemption has rendered any tribal remedies a nullity, there is -- in fact -- nothing to exhaust.

Here, the preemption of tribal law is clear. Since enactment of the AEA in 1946, the federal government has

occupied the entire field of regulating health and safety aspects of nuclear energy, including the production and processing of uranium ore. 42 U.S.C. §§ 2014(e), (z), (aa), 2061-2064, 2071-2078, 2091-2099, 2111-2114. Without question, the federal government has "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Devel. Comm'n*, 461 U.S. 190, 207 (1983). As the Court said in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984), the federal government has "*exclusive* regulatory authority over the safety aspects of nuclear power." (Emphasis added.) Accordingly, tribal regulation of health and safety issues related to uranium activities is precluded by federal law.[4]

But even beyond this, Congress directly addressed the present issue when it took the additional step of federalizing all tort claims arising from nuclear activities. In response to Three Mile Island and the Court's 1984 ruling in *Silkwood*, *supra*, that State punitive damage claims had not been preempted by the AEA, Congress enacted the Price-Anderson Amendments Act of 1988, amending the AEA to create an exclusive federal-law remedy for nuclear-related torts. Pub. L. No. 100-408, § 11, 102 Stat. 1066, 1076. Congress' objective was "to effect uniformity, equity, and efficiency in the disposition" of claims arising from nuclear-related activities. *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 857 (3d Cir. 1991); *see* H.R. Rep. No. 100-104, pt. 1, at 18 (1987). The Price-Anderson Amendments thus furthered the

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[4] *E.g.*, *South Dakota v. Bourland*, 508 U.S. 679, 690-91 (1993) (by authorizing State regulation and giving the Army Corps of Engineers regulatory control over certain reservation lands, Congress impliedly preempted tribe's jurisdiction to regulate nonmembers' hunting and fishing activities); *Northern States Power Co. v. Prairie Island Mdewakenton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993) (tribal ordinance regulating transportation of hazardous materials was preempted by Hazardous Materials Transportation Act).

AEA's goal of providing legal consistency and assurances to both individuals and the business sector concerning the operation of nuclear-related facilities.[5]

In brief, the AEA as amended in 1988 defines "public liability" to mean "any legal liability arising out of or resulting from a nuclear incident" (42 U.S.C. § 2014(w)), and "nuclear incident" to mean any occurrence within the United States causing injury or damage "resulting from the radioactive, toxic, explosive, or other hazardous properties" of nuclear materials. *Id.* § 2014(q). The statute defines "public liability action" to mean "*any* suit asserting public liability" (*id.* § 2014(hh) (emphasis added)), and provides that all such "public liability actions" are to be *federal-law* causes of action.[6] Congress thus ensured that federal jurisdiction would exist for all such claims (*see* S. Rep. No. 100-218, at

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[5] *See Pacific Gas & Elec.*, 461 U.S. at 207 (the AEA "grew out of Congress' determination that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing"); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 64 (1978) (Price-Anderson Act of 1977 amended the AEA to address concerns that private firms might refuse to operate nuclear-related facilities "if their liability were not limited by appropriate legislation").

[6] A public liability action *shall be deemed to be an action arising under section 2210 of this title*, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

Id. (emphasis added).

While a Price-Anderson claim borrows some elements from State law and thus "contains both federal and state elements," it is clearly a *federal* cause of action. *E.g.*, *In re TMI Cases*, 940 F.2d at 851-60 (claims under Price-Anderson are federal causes of action and thus properly within the federal courts' Article III jurisdiction of claims based on federal law).

13 (1987)), that a uniform federal standard of care would apply,[7] that related nuclear claims could be addressed in a coordinated fashion,[8] and -- with respect to tort claims subject to federal indemnification -- that special substantive rules would apply.[9]

Except for the Ninth Circuit, every Court of Appeals that has considered the issue has concluded that these Price-Anderson provisions establish an exclusive federal remedy for nuclear-related torts, preempting any other theories of liability. *See TMI*, *supra*, 940 F.2d at 854 ("A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all*"; state-law claims preempted (emphasis in original)); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("Nieman can sue under the Price-Anderson Act, as amended, or not at all"; state-law claims preempted); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994) ("A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or it is not compensable at all";

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[7] *See In re TMI Cases*, 940 F.2d at 854-60 (Price-Anderson Amendments require application of federal standard of care for nuclear facilities and preempt State standards).

[8] *See* 42 U.S.C. § 2210(n)(2) (defendant in a nuclear-related tort case may remove case from State to federal court); *id.* § 2210(n)(3) (chief judge of U.S. district court hearing nuclear-related claims may, upon making certain filings, appoint a special caseload management panel to coordinate cases); *id.* §§ 2210(h) & 2210(n)(2) (if nuclear-related claim is subject to federal indemnification, the Nuclear Regulatory Commission or Department of Energy may "take charge of [the] action" and obtain its removal from State to federal court).

[9] *E.g.*, 42 U.S.C. § 2210(e) (upper limit on aggregate liability); *id.* § 2210(n)(1) (mandating waiver of certain defenses); *id.* § 2210(s) (no punitive damages). As these provisions illustrate, some provisions of the Price-Anderson regime apply only to claims indemnified by the United States, whereas others apply to all "public liability actions." El Paso's and Cyprus' claims are not subject to federal indemnification.

state-law claims preempted). The Tenth Circuit, in the only other case to address whether Price-Anderson preempts tribal-law claims, likewise found preemption. *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998) ("The PAA [Price-Anderson Act] on its face provides the sole remedy for the torts alleged in this case [claims under tribal law]."). These conclusions clearly are correct, because Price-Anderson forecloses all claims for nuclear liability not expressly sanctioned by the Act and makes no exception for tribal law.[10]

The Ninth Circuit did not explicitly reject these holdings, for it purported to leave unresolved the question of preemption. *See* App., *infra*, 16a-17a. However, the court's rigid and mechanical analysis of tribal exhaustion wholly disregarded the important federal interests that caused Congress to adopt the Price-Anderson Amendments, and as a result the court required recourse to the very tribal claims and remedies that Congress abolished in 1988. By subjecting non-Indians to tribal-court proceedings without the protections of Price-Anderson, the Ninth Circuit has effectively rejected the preemption holdings of the other Circuits and imposed a tribal-exhaustion requirement at odds with both the logic and congressional intent of establishing an exclusive federal-law remedy. Non-Indians should not be subject to years of expensive tribal-court litigation before securing federal court answers to federal preemption questions that ultimately will be dispositive.

The relationship between federal preemption and the doctrine of tribal exhaustion is, of course, important beyond the Price-Anderson context. In many substantive areas,

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[10] Inexplicably, though, the Tenth Circuit in *Farley* required exhaustion of the preempted tribal remedies. In that respect, the Tenth Circuit committed the same error as the Ninth Circuit below. But, on the underlying preemption issue, the Ninth and Tenth Circuits appear to be setting different standards for different parts of the Navajo reservation, which falls in both federal circuits.

including railroad safety and operations,[11] wholesale power transactions,[12] and transportation and disposal of hazardous materials,[13] Congress has adopted pervasive regulatory regimes that call for application of uniform federal standards, rather than varying local standards. When faced with claims of conflict between federal and tribal law in these areas, some courts of appeals have decided that preemption issues can be resolved without exhaustion of tribal remedies,[14] whereas others have required exhaustion.[15] Guidance from this Court is needed. Where, as here, it is plain that federal law has preempted tribal law and that Congress intended an exclusive

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[11] Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20153 (FRSA); ICC Termination Act, 49 U.S.C. § 10501(b)(2).

[12] Federal Power Act of 1935, 16 U.S.C. § 824 *et seq.*; *see United States v. Public Utilities Comm'n*, 345 U.S. 295 (1953).

[13] Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 *et seq.* (RCRA); Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1819 (HMTA).

[14] For example, the Ninth Circuit's ruling here conflicts with *Northern States Power*, *supra*, where the Eighth Circuit held that a tribal ordinance requiring permitting for transportation of hazardous materials had been preempted by the HMTA. Consistent with that preemption holding, the court also held that tribal exhaustion was not required:

> The only [tribal] remedies are those created in the ordinance itself, and those remedies are void by virtue of the ordinance's preemption. This leaves NSP with nothing to exhaust.

991 F.2d at 463. *See also Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (RCRA preempts tribal authority over hazardous waste site; no exhaustion required).

[15] *E.g.*, *Reservation Tel. Coop. v. Three Affiliated Tribes*, 76 F.3d 181 (8th Cir. 1985) (telephone cooperatives must exhaust tribal remedies before raising federal preemption challenge to tribal tax on telephone rights-of-way); *Kerr-McGee v. Farley*, *supra* (nuclear-related tort).

federal-law remedy, requiring exhaustion of preempted tribal claims is the wrong result.

II. The Ninth Circuit's Decision Undermines *Strate v. A-1 Contractors* by Requiring Exhaustion Notwithstanding the Absence of Both Tribal Regulatory Jurisdiction and Any Useful Purpose for Exhaustion.

In *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997), this Court clarified the law of tribal exhaustion. The Ninth Circuit's decision threatens to undermine much of what *Strate* sought to accomplish.

Strate contains three important teachings. First, the decision clarifies that the principle of tribal court exhaustion in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), does not expand a tribe's jurisdiction over non-members beyond the limitations set forth in *Montana v. United States*, 450 U.S. 544 (1981). That is, *Montana*'s "general proposition" that a tribe's inherent sovereign powers "do not extend to the activities of nonmembers of the tribe" (450 U.S. at 565) is equally true for adjudicatory jurisdiction and for regulatory jurisdiction.

Second, the *Strate* Court unequivocally held that tribal court jurisdiction cannot exist where tribal regulatory jurisdiction is absent: "As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate*, 117 S. Ct. at 1413. The Court thus clarified the oft-quoted passage in *Iowa Mutual* that, with respect to "the activities of non-Indians on reservation lands," civil jurisdiction "presumptively lies in the tribal courts" (480 U.S. at 18). What was meant, *Strate* explained, was the "unremarkable" proposition that a tribe may have adjudicatory jurisdiction "where tribes possess *authority to regulate* the activities of nonmembers." *Strate*, 117 S. Ct. at 1413 (emphasis added).

Third, *Strate* explained that tribal exhaustion was a principle "based on comity," "prudential" in nature, and "not

an unyielding requirement." *Id.* at 1411 n. 7 & 1413. Thus, unlike the approach taken by the Ninth Circuit, exhaustion should not be blindly required where it will serve no useful purpose. *National Farmers Union* and *Iowa Mutual* observed that development of a full record in tribal court may be desirable not simply as an exercise of courtesy, but because the tribal court's findings of fact and conclusions on tribal law may inform the federal court on the issue of tribal jurisdiction.[16] In *Strate*, the Court recognized the other side of the same coin: that it may be clear at the outset that the tribe lacks jurisdiction and that its "expertise" on tribal law is of no moment.

Thus, *Strate* held that, if it is "plain" that a tribe lacks jurisdiction over a nonmember's conduct, "it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct." *Id.* at 1416 n.14. "Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, *the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.*" *Id.* (internal citation omitted) (emphasis added).[17]

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[16] *See National Farmers*, 471 U.S. at 856-57 (exhaustion in the tribal courts will give federal courts "the benefit of their expertise"); *Iowa Mutual*, 480 U.S. at 16 ("tribal courts are best qualified to interpret and apply tribal law").

[17] This functional analysis is consistent with the approach to exhaustion applied in other contexts, where the lower courts are to balance the interests in prompt access to a judicial forum with countervailing interests that may support exhaustion of other remedies. *E.g., McCarthy v. Madigan*, 503 U.S. 140, 144, 146, 147-48 (1992) (exhaustion not required where agency lacked power to grant petitioner the requested relief); *Bowen v. City of New York*, 476 U.S. 467, 484 (1986) ("application of the exhaustion doctrine is 'intensely practical'"), *quoting Mathews v. Eldrige*, 424 U.S. 319, 331 n.11 (1976); *McKart v. United States*, 395 U.S. 185, 198 (1969) (exhaustion not required where only issue was one of statutory construction that did not require agency expertise). Similarly, (continued...)

In its decision below, the Ninth Circuit undermined all these *Strate* teachings. It refused to apply a *Montana* analysis[18] or otherwise to consider whether the Navajo tribe possessed regulatory jurisdiction over the uranium mining activities of El Paso and Cyprus. Instead, noting that the alleged harms occurred within the reservation, the court inquired only as to whether the AEA or Price-Anderson contained an express statutory preclusion of tribal adjudicatory jurisdiction. *See National Farmers Union*, 471 U.S. at 856 n.21 (noting "express jurisdictional prohibitions" to be one legitimate ground not to require exhaustion). Finding none, it concluded mechanically that exhaustion was mandatory. Both AEA preemption of tribal regulatory jurisdiction and the Price-Anderson federalization of nuclear torts were brushed aside as irrelevant in the absence of an express statutory prohibition on tribal jurisdiction. App., *infra*, 15a-16a.

Further, the Ninth Circuit gave no weight to the fact that tribal court proceedings could not possibly result in findings of fact or conclusions on tribal law that would be useful to a federal court in deciding the critical issues of preemption and tribal jurisdiction. The arguments of El Paso and Cyprus that the AEA and Price-Anderson preempt tribal causes of action and thus bar jurisdiction over tribal-law claims present issues solely of federal law, not of fact and not of tribal law. There is nothing the tribal courts can say or do that will clarify or elucidate those issues. Exhaustion here "would serve no purpose other than delay." *Strate*, 117 S. Ct. at 1416 n.14.

By narrowly reading *Strate* and ignoring its key teachings, the Ninth Circuit injected unnecessary confusion, error, and

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[17](...continued)
the rule in the analogous area of federal/State abstention (*Iowa Mutual*, 480 U.S. at 16 n.8) is that a federal court will not defer to State proceedings where issues of federal law are predominant. *E.g., Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984).

[18] "Because this case is distinguishable from *Strate*, we need not consider whether a *Montana* exception applies." App., *infra*, 15a n.5.

uncertainty into the law of tribal exhaustion. To have coherence, the law of tribal exhaustion must be based on logical, understandable principles. One such principle must be that -- to impose its judicial powers upon non-members -- the tribe must have regulatory jurisdiction over the subject of the adjudication. Another must be that exhaustion is required only when it will help elucidate the question -- ultimately to be decided by a federal court -- whether the tribe's assertion of jurisdiction is proper under federal law. The Ninth Circuit's ruling does violence to these principles and leaves uncertain their legitimate role in future lower court adjudications.

III. The Ninth Circuit Had No Jurisdiction To Vacate an Injunctive Order From Which No Appeal Had Been Taken.

What we have said so far deals with the Ninth Circuit's substantive errors in requiring tribal exhaustion of preempted tribal-law claims. On that issue, at least the court of appeals had jurisdiction to rule as it did (wrong as its ruling was). As to a separate ruling, however, the Ninth Circuit compounded its substantive errors by acting outside its jurisdiction. It did so by concluding, contrary to the holdings of this Court and many other Circuits, that it had jurisdiction to vacate, for appellees' benefit, the district court's injunctions from which no appeal or cross-appeal had been filed.

Numerous cases have held that an appellee who fails to cross-appeal from a trial court order may not attack that order with a view to enlarging his or her rights or reducing the rights of the opposing party. *E.g.*, *Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191-93 (1937) (appellate court may not "give a new measure of relief" to appellee); *Miller v. Butcher Distribs.*, 89 F.3d 265, 267 (5th Cir. 1996); *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437, 441 (7th Cir. 1992). Likewise, "[a] cross-petition is *required* . . . when the respondent seeks to alter the judgment below." *Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S.

355, 364 (1994) (emphasis added). *See also Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (courts may not waive the jurisdictional requirements of Federal Rules of Appellate Procedure 3 and 4).

Nonetheless, citing "comity considerations" (App., *infra*, 9a), the Ninth Circuit *sua sponte* asserted jurisdiction to vacate and reverse preliminary injunctions issued by the district court that had directed the Neztsosies and Ms. Richards not to seek tribal-court relief under the Price-Anderson Act. The only authority that the Ninth Circuit cited for its assertion of jurisdiction dealt with the very different question of whether an appellate court was entitled to consider a new *legal argument*, not raised by the parties, to vacate an order that appellants had properly brought within the appellate court's jurisdiction.[19] Here, by contrast, the Ninth Circuit overturned an order against appellees which they had neither appealed nor cross-appealed. By starting down the road of finding "comity" exceptions to a previously well-established jurisdictional rule, the Ninth Circuit has created new confusion and uncertainty on a central question of appellate jurisdiction.

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[19] *Stone v. City & County of San Francisco*, 968 F.2d 850, 855 (9th Cir. 1992) ("*Issues* touching on federalism and comity may be considered *sua sponte*.") (emphasis added) (App., *infra*, 9a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 26, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EL PASO NATURAL GAS COMPANY,
a Delaware Corporation,
Plaintiff-Appellant,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE,
Defendants-Appellees.

No. 96-17121
DC No. CV-96-00049-RGS

CYPRUS FOOTE MINERAL COMPANY,
a Pennsylvania Corporation;
CYPRUS AMAX MINERAL COMPANY,
a Delaware Corporation,
Plaintiffs-Appellants,

v.

ZONNIE MARIE DANDY RICHARDS,
individually and as representative
of the Estate of Harold J.Richards, Sr.,
Defendant-Appellee.

No. 96-17139
DC No. CV-96-01524-RGS

Appeals from the United States District Court
for the District of Arizona

Filed February 11, 1998
Amended April 27, 1998

Before: Judges Harry Pregerson, Warren J. Ferguson, and Andrew J. Kleinfeld, Circuit Judges

Opinion by Judge Pregerson; Dissent by Judge Kleinfeld

OPINION

PREGERSON, Circuit Judge:

Members of the Navajo Nation (the "Navajo Court Plaintiffs") filed two separate actions in Navajo Tribal Court against corporations that conducted uranium mining operations on the Navajo Nation Reservation. The Navajo Court Plaintiffs alleged personal injury and wrongful death claims based on Navajo common law. In response to those actions, El Paso Natural Gas Company ("El Paso") and Cyprus Foote Mineral Company and Cyprus Amax Minerals Company (collectively "Cyprus") filed two separate suits in federal district court seeking preliminary injunctions to enjoin the Navajo Tribal Court from asserting jurisdiction over the Navajo Court Plaintiffs' claims. El Paso and Cyprus (collectively the "mining companies") alleged that all actions arising from "nuclear incidents" fall within the Price-Anderson Act, 42 U.S.C. § 2011 *et seq.*, and must be litigated in federal court.

The district court granted in part, and denied in part, the mining companies' requests for preliminary injunctions. The district court granted the preliminary injunctions to the extent the Navajo Court Plaintiffs alleged claims under Price-Anderson. The district court denied the preliminary injunctions, however, to the extent the Navajo Court Plaintiffs did not allege Price-Anderson claims. We have jurisdiction under 28 U.S.C. § 1292(a)(1). We affirm in part and reverse in part.

FACTS AND PRIOR PROCEEDINGS

The two actions filed by the Navajo Court Plaintiffs have been consolidated for this appeal. The facts and prior proceedings in each of these actions are as follows:

1. *Neztsosie v. El Paso*

Between 1956 and 1959, Rare Metals Corporation of America ("Rare Metals"), a now defunct subsidiary of El Paso, conducted uranium mining operations on the Navajo Nation Reservation. On March 29, 1995, Laura and Arlinda Neztsosie (the "Neztsosies"), members of the Navajo Nation, filed suit against Rare Metals in Navajo Tribal Court. The Neztsosies asserted claims for personal injuries arising from Rare Metals' uranium mining activities.

On January 5, 1996, El Paso filed suit against the Neztsosies in the United States District Court for the District of Arizona. El Paso sought a preliminary injunction enjoining the Neztsosies from prosecuting their claims in the Navajo Tribal Court. El Paso also sought a declaration that the Navajo Tribal Court had no jurisdiction over the Neztsosies's claims. El Paso asserted that the Neztsosies had to litigate their claims in federal court because their claims alleged liability arising from a "nuclear incident" under the Price-Anderson Act, 42 U.S.C. §§ 2014, 2210.

After a hearing, District Court Judge Robert G. Strand, entered an order denying in part, and granting in part, El Paso's request for a preliminary injunction. The district court denied El Paso's request for a preliminary injunction "to the extent that it in any way seeks to have this Court rule on any aspect of jurisdiction of the Navajo tribal court . . . except to the extent that [the Neztsosies] seek relief based upon the Price-Anderson Act in tribal court." In reaching its decision, the district court relied on "principles of tribal sovereignty" and the "tribal exhaustion doctrine." The district court stated,

however, that it did not determine whether Price-Anderson had any application to the claims asserted by the Neztsosies in Tribal Court.

2. *Richards v. Cyprus*

Cyprus Foote Mineral Company is the successor by merger to Vanadium Corporation of America ("VCA"). From the 1940's through the 1960's, VCA operated a uranium mine in Cane Valley, Arizona, known as Monument No. 2 mine. During the 1960's, VCA also constructed and operated a uranium concentrator at the Monument No. 2 mine site. The remnants of the ore concentrating process consisted of uranium tailings. The tailings produced by the concentrator were stored on a tailings pile on land adjacent to the Monument No. 2 mine site.

On April 20, 1995, Zonnie Marie Dandy Richards, a member of the Navajo Nation, filed suit individually, and as representative of her deceased husband's estate, against VCA and others in Navajo Tribal Court. Richards asserted claims for wrongful death and personal injuries arising from VCA's activities at the Monument No. 2 mine site.

On June 26, 1996, Cyprus filed suit against Richards in the United States District Court for the District of Arizona. Like El Paso, Cyprus sought a preliminary injunction enjoining Richards from prosecuting her claims in Navajo Tribal Court. Cyprus also sought a declaration that the Navajo Tribal Court had no jurisdiction over Richards's claims. Cyprus alleged that Richards had to litigate her claims in federal court because she alleged liability arising from a "nuclear incident" under Price-Anderson.

The Richards action, like the Neztsosie action, was assigned to District Court Judge Strand. The district court entered an order substantially similar to the order issued in the Neztsosie matter. The district court denied in part, and granted in part, Cyprus's request for a preliminary injunction.

El Paso and Cyprus timely appeal the district court's orders.

STANDARD OF REVIEW

We review de novo whether the district court was required to abstain from granting or denying an injunction when a party has failed to exhaust tribal court remedies. *Burlington N. R.R. v. Red Wolf*, 106 F.3d 868, 869-70 (9th Cir. 1997) (en banc).

I. The Tribal Exhaustion Requirement

The Supreme Court has stated that, subject to certain exceptions, comity principles require federal courts to either dismiss or abstain from deciding cases in which a party asserts that concurrent jurisdiction exists in an Indian tribal court. *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) (citing *National Farmers Un. Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987)). "Considerations of comity require the exhaustion of tribal remedies before the [tribal court's jurisdiction] may be addressed by the district court." *Wellman v. Chevron USA, Inc.*, 815 F.2d 577, 578 (9th Cir. 1987). "The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Burlington N. R.R. v. Crow Tribal Council* ("*Crow Tribal Council*"), 940 F.2d 1239, 1245 (9th Cir. 1991). "Until petitioners have exhausted the remedies available to them in the Tribal Court system, it would be premature for a federal court to consider any relief." *National Farmers*, 471 U.S. at 857 (footnote omitted); *see also Yellowstone County v. Pease*, 96 F.3d 1169, 1171 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997) ("[A] party *must* exhaust tribal court remedies before a federal district court may entertain a challenge to tribal jurisdiction.") (emphasis added); *Crow Tribal Council*, 940 F.2d at 1244

("[F]ederal courts should not even make a ruling on tribal court jurisdiction until tribal remedies are exhausted.") (citation omitted).

"[T]he initial determination of whether the Tribe has jurisdiction lies with the tribal court alone." *Crow Tribal Council,* 940 F.2d at 1244. "[N]on-Indian defendants *must exhaust tribal court* remedies before seeking relief in federal court, even where defendants allege that proceedings in tribal court exceed tribal sovereign jurisdiction." *Id.*

The tribal exhaustion requirement is based on considerations of comity and the long-standing policy of promoting tribal self-government and self-determination. *National Farmers,* 471 U.S. at 856. "[T]he federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'" *Iowa Mut.,* 480 U.S. at 16 (quoting *National Farmers,* 471 U.S. at 857).

The existence and extent of a tribal court's jurisdiction require a careful examination of tribal sovereignty. "[T]hat examination should be conducted in the first instance in the Tribal Court itself." *National Farmers,* 471 U.S. at 856. "[P]roper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify errors.'" *Iowa Mut.,* 480 U.S. at 16 (citing *National Farmers,* 471 U.S. at 857).

While tribal exhaustion promotes tribal self-government and self-determination, it also promotes judicial efficiency:

> [T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed . . . . Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of

> their expertise in such matters in the event of further judicial review.

National Farmers, 471 U.S. at 856-57. "Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* at 856.

In this case, the mining companies have not exhausted their tribal court remedies. Instead, the mining companies chose to file actions in federal district court seeking to enjoin the Navajo Tribal Court from asserting jurisdiction over the Navajo Court Plaintiffs' claims. *See Iowa Mut.,* 480 U.S. at 17 ("At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts."). Thus, unless an exception to the tribal exhaustion requirement applies, the district court was obligated to abstain from ruling on the tribal court's jurisdiction over the Navajo Court Plaintiffs' common law claims.

An exception to the tribal exhaustion requirement exists where: (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) tribal court jurisdiction patently would violate express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; or (4) no federal grant authorizes tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule. *See Strate v. A-1 Contractors*, ___ U.S. ___, 117 S. Ct. 1404, 1416 n.14 (1997); *National Farmers*, 471 U.S. 845 at 856 n.21. In this case, the parties only dispute the applicability of the "express jurisdictional prohibition" exception to tribal court jurisdiction. "A substantial showing must be made by the party seeking to invoke [the 'express jurisdictional prohibition'] exception to

the tribal exhaustion rule." *Kerr-McGee Corp. v. Farley ("Farley")*, 115 F.3d 1498, 1502 (10th Cir. 1997). "[T]ribal courts rarely lose the first opportunity to determine jurisdiction because of an 'express jurisdictional prohibition.' *Id.*

II. The District Court's Orders

In this case, the district court's orders appear to hold that Price-Anderson constitutes an express prohibition of tribal court jurisdiction. The district court denied the mining companies' requests for preliminary injunctions "except to the extent that [the Navajo Court Plaintiffs] seek relief based upon the Price-Anderson Act in tribal court." The district court also stated that it did not determine whether Price-Anderson had any application to the claims asserted by the Navajo Court Plaintiffs.

The mining companies have appealed that portion of the district court's orders that allow the Navajo Court Plaintiffs to pursue claims in Navajo Tribal Court other than Price-Anderson claims. The mining companies assert that the Navajo Court Plaintiffs are barred from pursuing any claims in Navajo Tribal Court because the Navajo Court Plaintiffs' claims arise from a nuclear tort and fall within the ambit of Price-Anderson.

The Navajo Court Plaintiffs, on the other hand, have not appealed the district court's rulings that Price-Anderson constitutes an express prohibition of tribal court jurisdiction. Rather, the Navajo Court Plaintiffs seek to affirm that portion of the district court's orders that allow them to pursue claims other than Price-Anderson claims in Navajo Tribal Court. The Navajo Court Plaintiffs contend that their claims are based on Navajo common law and do not implicate Price-Anderson.

It is unclear why the Navajo Court Plaintiffs have not appealed the district court's rulings that Price-Anderson constitutes an express jurisdictional prohibition that prevents

the Navajo Tribal Court from determining its jurisdiction over such claims. Nevertheless, because of the important comity considerations involved, we *sua sponte* examine whether Price-Anderson constitutes an express prohibition of tribal court jurisdiction. *See Stone v. City and County of San Francisco*, 968 F.2d 850, 855 (9th Cir. 1992) ("Issues touching on federalism and comity may be considered *sua sponte*.").[1]

As the following discussion demonstrates, we conclude that Price-Anderson does not contain an express jurisdictional prohibition barring the Navajo Tribal Court from determining its jurisdiction over the Navajo Court Plaintiffs' claims. Therefore the mining companies, before proceeding in federal court, are obligated to first exhaust their tribal court remedies.

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[1]Our decision to review this issue *sua sponte* is further supported by: (1) the Tenth Circuit's recent decision in *Farley*, 115 F.3d at 1505, which expressly rejected the claim that Price-Anderson constitutes an express jurisdictional prohibition; and (2) the district court's misplaced reliance on *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046 (D. Ariz. 1981), in considering the tribal exhaustion doctrine.

In *Benally*, a corporation operating a uranium mill near the Navajo reservation brought an action in federal district court to enjoin several members of the Navajo Nation from proceeding in Navajo Tribal Court on civil actions alleging personal injuries and property damage arising from the corporation's activities. *Id.* at 1048. The district court concluded that the tribal court had no jurisdiction. *Benally* is not dispositive, however, because it was decided before the Supreme Court announced the tribal exhaustion doctrine in *National Farmers*. Moreover, the conduct at issue in Benally took place off the reservation, whereas in this case the alleged conduct took place on the Navajo Nation Reservation. Tribal jurisdiction applies more clearly to conduct occurring on reservation lands. *See Iowa Mut.*, 480 U.S. at 18 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.") (emphasis added); *Crawford*, 947 F.2d at 1408 ("When the dispute is a 'reservation affair' . . . there is no discretion not to defer.").

III. Price-Anderson

The mining companies assert that Price-Anderson and its legislative history mandate exclusive federal court jurisdiction for claims arising from "nuclear incidents." The mining companies also assert that we may infer an express jurisdictional prohibition. These contentions are not persuasive.

Before 1954, a federal monopoly existed over the use, control, and ownership of nuclear technology. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 206 (1983). In 1954, however, Congress passed the Atomic Energy Act to encourage the private sector to become involved in the development of atomic energy under federal regulation. *Id.* at 206-07.

In 1957, Congress enacted Price-Anderson. Price-Anderson amended the Atomic Energy Act by creating specific protections for the nuclear industry from tort liability. *See Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 251 (1984). Price-Anderson contains three distinct elements. First, it sets a ceiling on the aggregate damage award for nuclear tort claims that can be imposed against an entity involved in the use or handling of radioactive material. *In re TMI Litig. Cases Consol. II,* 940 F.2d 832, 852 (3d Cir. 1991). Second, it indemnifies any entity exposed to potential liability for activity resulting in a nuclear incident, even if the entity did not directly participate in the activity. *Id.* Third, Price-Anderson established an indemnification program through which the federal government would require entities involved in nuclear activities to obtain private insurance to a certain level, and then the federal government would pay all public liability claims above that liability ceiling. *Farley,* 115 F.3d at 1503.

Until amended in 1988, Price-Anderson's provisions regarding nuclear tort litigation did not apply unless and until the Nuclear Regulatory Commission ("NRC") determined that

an "extraordinary nuclear occurrence" had transpired. *O'Conner v. Commonwealth Edison Co.,* 13 F.3d 1090, 1095-96 (7th Cir. 1994). The 1988 amendments to Price-Anderson expanded its reach to include all "public liability actions" and eliminated the requirement that the NRC designate an extraordinary nuclear occurrence. 42 U.S.C. § 2210(n)(2). *See also* S. Rep. No. 218, 100th Cong., 1st Sess. 2, at 13 (1987) ("Any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act."); H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 (same).

Price-Anderson states:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant . . . any such action pending in any State court . . . or United States district court shall be removed or transferred to the United States district court having venue under this subsection.

42 U.S.C. § 2210(n)(2). Price-Anderson defines "public liability action" as "any suit asserting public liability." *Id.* § 2014(hh). "Public liability means any legal liability arising out of or resulting from a nuclear incident." *Id.* § 2014(w). A "nuclear incident means any occurrence . . . within the United States causing . . . bodily injury, sickness, disease, or death . . . arising out of or resulting from the radioactive,

toxic, explosive, or other hazardous properties of source,[2] special nuclear, or byproduct material."[3] *Id.* § 2014(q).

"Although the public liability cause of action is built around preexisting state law, it contains some distinctively federal elements as well." *O'Conner,* 13 F.3d at 1096; see also 42 U.S.C. § 2014(hh) ("The substantive rules for decision in [a public liability] action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [42 U.S.C. § 2210]."). For example, Price-Anderson as amended in 1988 provides the limitations period for public liability actions, 42 U.S.C. § 2210(n)(1), provides for venue, *id.* § 2210(n)(2), limits the availability of punitive damages in an action arising out of an extraordinary nuclear occurrence, *id.* § 2210(s), and mandates the waiver of normally-available defenses in the case of extraordinary nuclear occurrences. *Id.* § 2210(n)(1).

IV. Price-Anderson does not Constitute an Express Jurisdictional Prohibition

One exception to the tribal exhaustion requirement calls for an *express* jurisdictional prohibition. *See National Farmers,* 471 U.S. at 857 n.21. This exception rarely applies. *See Farley,* 115 F.3d at 1502 (noting that a tribal court "rarely" loses the opportunity to determine its jurisdiction because of an express jurisdictional prohibition). "Civil jurisdiction over the activities of non-Indians on reservation lands 'presumptively lies in the tribal courts unless *affirmatively* limited by a specific treaty provision or federal

[2]"[S]ource material means (1) uranium, thorium, . . . or (2) ores containing one or more of the foregoing materials." 42 U.S.C. § 2014(z).

[3]"[B]yproduct material" includes "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e).

statute.'" *Stock West, Inc. v. Confederated Tribes of the Colville Reservation,* 873 F.2d 1221, 1228 (9th Cir. 1989) (emphasis added) (quoting *Iowa Mut.,* 480 U.S. at 18).

Price-Anderson contains no such *express* prohibition of tribal court jurisdiction. Price-Anderson provides for *concurrent* rather than exclusive jurisdiction over claims arising from nuclear incidents. It merely grants defendants the *right*, rather than the obligation, to remove such cases to federal court. *See* 42 U.S.C. § 2210(n)(2) ("Upon motion of the defendant . . . any such action pending in any State court . . . shall be removed or transferred to the United States district court having venue under this subsection.").[4]

In *Farley*, the Tenth Circuit held that Price-Anderson does not constitute an express jurisdictional prohibition. In that case, certain members of the Navajo Nation filed an action in the Navajo Tribal Court against two mining companies. The mining companies had conducted operations on the Navajo Nation Reservation between 1952 and 1973. *Farley,* 115 F.3d at 1500. The plaintiffs alleged that the mining companies' mill released vast quantities of radioactive and toxic materials, which caused injuries. *Id.* The mining companies, without answering the tribal court complaint, filed an action in federal district court seeking to enjoin the suit from proceeding in the tribal court. *Id.* The mining

[4]The mining companies' reliance on *United States v. White Mountain Apache Tribe,* 784 F.2d 917 (9th Cir. 1986) and *United States v. Yakima Tribal Court,* 806 F.2d 853 (9th Cir. 1986) is misplaced. In *White Mountain*, we stated: "There is no point in requiring exhaustion . . . because tribal court jurisdiction is clearly foreclosed by the sovereign immunity of the United States." *White Mountain,* 784 F.2d at 920 n.10; *see also Yakima,* 806 F.2d at 861 (following *White Mountain*). Unlike *White Mountain* and *Yakima*, in this case, Navajo Tribal Court jurisdiction is not "clearly foreclosed" by Price-Anderson. Moreover, it is for the Navajo Tribal Court to first determine whether the Navajo Court Plaintiffs have even asserted Price-Anderson claims.

companies asserted that Price-Anderson constitutes an express jurisdictional prohibition of tribal court suits involving nuclear torts. Thus, they argued that they had no obligation to exhaust tribal court remedies. *Id.*

The district court disagreed and stated that the "Price-Anderson Act and its amendments are devoid of any mention of 'Indians,' 'tribes,' or 'tribal-court jurisdiction.'" *Kerr-McGee Corp. v. Farley,* 915 F. Supp. 273, 277 (D.N.M. 1995), *aff'd*, 115 F.3d 1498 (10th Cir. 1997). The district court further noted:

> The Price-Anderson Act does not affirmatively limit tribal court jurisdiction. Although Congress has plenary power to define the jurisdiction of tribal courts, it did not exercise that power, when it drafted the Price-Anderson Act. The Act makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established policy promoting tribal self-government.

915 F. Supp. at 280 (citation omitted).

The Tenth Circuit affirmed the district court's decision to stay all proceedings before it until the mining companies exhausted their tribal court remedies. The Tenth Circuit noted: "The 1988 amendments [to Price-Anderson] do not explicitly create *exclusive* federal court jurisdiction over nuclear incident litigation." *Farley,* 115 F.3d at 1504.[5]

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[5]At oral argument, the mining companies contended that the Supreme Court's recent decision in *Strate* controlled this case. In *Strate*, the Supreme Court found that, absent a treaty or statute, an Indian tribe lacked jurisdiction over a dispute between nonmembers of the tribe when that dispute arose from an accident occurring on a state highway within the reservation. *Strate*, 117 S. Ct. at 1407-08. The Court noted that, when a tort occurs on alienated land, the tribal court will have jurisdiction over the

The mining companies contend that cases interpreting the 1988 Price-Anderson amendments recognize the Act's exclusivity. *See Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("[A plaintiff] can sue under the Price-Anderson Act, as amended, or not at all."); *In re TMI Litig.*, 940 F.2d at 854 ("A claim growing out of any nuclear incident is compensable under the terms of the [1988

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claim only where the tribe regulates one of two situations discussed in *Montana v. United States,* 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981): (1) consensual relationships between nonmembers and the tribe, or (2) conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana,* 450 U.S. at 566.

We find *Strate* inapposite to the facts of this case because the incident in *Strate* arose from a traffic accident on a state highway within the tribe's reservation. The *Strate* Court placed great emphasis on the fact that the state highway was open to the public and controlled and maintained by the state. *Strate,* 117 S. Ct. at 1414. Conversely, in this case the Navajo Nation retained tribal sovereignty over the land the mining companies occupied, which land was neither open to the public nor controlled or maintained by any entity other than the tribe. The *Strate* Court expressly declined to address cases, like the present one, where the disputed tort involved nonmembers of the tribe and occurred on tribal land. *See id.* at 1408 ("We express no view on the governing law or proper forum when an accident occurs *on a tribal road* within a reservation.") (emphasis added). Because this case is distinguishable from *Strate*, we need not consider whether a *Montana* exception applies. It seems indisputable, however, that a claim involving uranium contamination poses a danger to the 'health or welfare of the tribe.'

The dissent contends that *Burlington N. R.R. Co. v. Red Wolf,* 106 F.3d 868 (9th Cir. 1996), *vacated*, 1997 WL29189 (U.S. October 6, 1997) has expanded *Strate*, and that those two cases control the outcome here. In *Red Wolf*, we held that a railroad sued for a tort arising on a reservation must exhaust its tribal court remedies before a district court can exercise jurisdiction. The Supreme Court vacated our decision in *Red Wolf* and instructed us to reconsider our holding in light of *Strate*. But here, unlike in *Red Wolf*, there is no question that the Navajo Nation retained its sovereignty over the mine sites.

Amendments to the Act] or *it is not compensable at all.*"); *O'Conner,* 13 F.3d at 1099 ("The broad definition of 'public liability action' embodied in the Price-Anderson Act implies that Congress has exercised power under Article I and has enacted a new and independent, indeed exclusive, cause of action."). These cases are inapplicable, however, because they only address federal-state jurisdictional issues relating to Price-Anderson. They do not address Indian tribes or tribal sovereignty.

"Indian tribes occupy a unique status under our law." *National Farmers,* 471 U.S. at 851. "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . . The relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 15-16 (1831).

Comity concerns differ between federal-state and federal-tribal jurisdiction:

> As in cases raising comity concerns regarding federal-state jurisdiction, comity concerns in federal-tribal jurisdiction arise out of mutual respect between sovereigns. In the realm of federal-tribal jurisdiction, however, Congress has expressed an additional interest in promoting the development of tribal sovereignty. The Supreme Court has recognized this congressional intent and assiduously advocated federal abstention in favor of tribal courts.

Smith v. Moffett, 947 F.2d 442, 445 (10th Cir. 1991). Thus, even if Price-Anderson preempts *state court* jurisdiction -- still an open question in this circuit -- there is no express prohibition of *tribal court jurisdiction*.

The Supreme Court has also recognized that comity concerns differ between federal-state and federal-tribal jurisdiction. In *Iowa Mut. Ins. Co. v. LaPlante*, the Supreme Court refused to infer that the diversity statute, 28 U.S.C. § 1332, divested tribal courts of jurisdiction in diversity actions. *Iowa Mut.*, 480 U.S. at 17-18. The Supreme Court stated that § 1332 "makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government." *Id.* at 17.

The Supreme Court noted: "'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.'" *Id.* at 18 (quoting *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 149 n.14 (1982)). Thus, the Court held that "in the absence of any indication that Congress intended [§ 1332] to limit the jurisdiction of the tribal courts, we decline . . . to hold that tribal sovereignty can be impaired in this fashion." *Id.*

We have also refused to infer a prohibition of tribal court jurisdiction absent express language in addressing 28 U.S.C. § 1355. *United States v. Plainbull,* 957 F.2d 724 (9th Cir. 1992). Section 1355 states: "The district courts shall have original jurisdiction, exclusive of the courts of the States" over certain actions brought by the federal government. 28 U.S.C. § 1335 (emphasis added). We noted that the plain language of § 1355 "only grants the district court original jurisdiction 'exclusive of the courts of the States,' not exclusive of all other courts that would otherwise have had jurisdiction. Since a tribal court is not a state court, we hold that it does not fall within the exclusive jurisdiction provision of section 1355." *Id.*

The mining companies rely on *Lower Brule Constr. Co. v. Sheesley's Plumbing & Heating Co.,* 84 B.R. 638 (D.S.D. 1988) in asserting that tribal jurisdiction can be

limited absent an express jurisdictional prohibition. This claim is also without merit. In *Brule*, the Tribal Housing Authority asserted that the tribal court had jurisdiction over a bankruptcy action. *Id.* at 640. The district court disagreed, however, and concluded that the tribal court's civil jurisdiction was "unlimited only in relation to matters of Indian self-government." *Id.* at 641. The district court reasoned that requiring tribal courts to perform as bankruptcy courts "would not promote self-government among the Indian tribes, even assuming that a body of 'bankruptcy' law existed in tribal court." *Id.* The court further noted: "The Bankruptcy Code makes no reference to Indians or tribal courts and there is no Congressional grant of authority for Indian tribal courts to assume jurisdiction over bankruptcy proceedings." *Id.* at 642.

Brule is of limited guidance in this case. First, we have already determined that an express jurisdictional prohibition is required to limit tribal court jurisdiction. See *Plainbull,* 957 F.2d at 726; *see also Farley,* 115 F.3d at 1505 ("Simply put, 'exclusive jurisdiction' is not conferred unless conferred explicitly."). Second, the tribe in Brule did not allege that it had a body of bankruptcy law which it could apply. In this case, however, the Navajo Court Plaintiffs have apparently asserted claims based on Navajo common law - an area clearly within the Navajo Tribal Court's expertise.[6]

Even if the issue were ambiguous, federal courts are "required to construe ambiguity in statutes on Indian affairs in favor of preserving Indian sovereignty." *Poodry v. Tonawanda Band of Seneca Indians,* 85 F.3d 874, 889 (2d Cir.), *cert. denied*, 117 S. Ct. 610 (1996). In this case,

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[6]The mining companies also contend that Price-Anderson is the exclusive method for bringing nuclear tort claims because Price-Anderson provides a means of consolidating claims and ensuring a fair and equitable distribution of funds to all those affected by a nuclear incident. This claim is unavailing because it merely seeks to "infer" a jurisdictional prohibition where no "express" jurisdictional prohibition exists.

members of the Navajo Nation have alleged claims for personal injury and wrongful death arising from activity occurring on the Navajo Nation Reservation. Allowing the Navajo Tribal Court to determine its jurisdiction over these claims will preserve Indian sovereignty.

CONCLUSION

For the reasons stated above, we hold that Price-Anderson does not constitute an express jurisdictional prohibition that prevents the Navajo Tribal Court from determining its jurisdiction over the Navajo Court Plaintiffs' claims for personal injury and wrongful death arising from activities occurring on the Navajo Nation Reservation.[7] Accordingly, we reverse that portion of the district court's orders granting the mining companies' requests for preliminary injunctions. We affirm that portion of the district court's orders denying the mining companies' requests for preliminary injunctions.

Because the Navajo Tribal Court is to determine in the first instance whether it has jurisdiction over the Navajo Court Plaintiffs' claims, we remand this matter to the district court to either enter a stay of all proceedings or dismiss the complaint without prejudice pending the exhaustion of tribal court remedies. *See Iowa Mut.,* 480 U.S. at 20 n.14.

AFFIRMED in part, REVERSED in part, and REMANDED.

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[7]In holding that Price-Anderson does not constitute an express jurisdictional prohibition, we need not consider the Navajo Court Plaintiffs' alternative claim that Price-Anderson does not apply because the mining companies had no indemnity agreement with the federal government. *See Silkwood,* 464 U.S. at 251-52 n.12 ("Government indemnification is available only to those required to maintain financial protection . . . and the liability limitation applies only to those who are indemnified.").

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

In these two lawsuits, three Navajo Indians sued El Paso Natural Gas Company, a Delaware corporation, and Cyprus Foote Mineral Company, a Pennsylvania corporation, in Navajo tribal court. The Richards case alleged death from cancer caused by radiation. The Neztsosies' case alleged that the Neztsosies and their cattle were poisoned by drinking water contaminated with radiation and heavy metals. The uranium mining occurred many years ago. In ruling on a motion for preliminary injunction, the district court ruled that tribal court proceedings were enjoined as to Price-Anderson claims, but not as to other claims, and did not rule on whether the Price-Anderson Act applied to claims asserted by plaintiffs in tribal court. Plaintiffs did not appeal the injunction against litigating Price-Anderson claims in tribal court, so it should be treated as law of the case. The corporations appealed denial of the preliminary injunction as to all claims not covered by Price-Anderson. The majority opinion lets the plaintiffs sue the corporations in tribal court on all their claims, Price-Anderson or not. That is incorrect.

The Price-Anderson Act, as originally enacted in 1957, did not create a federal tort cause of action, nor confer jurisdiction on the federal courts. *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490, 493 (3d Cir. 1986); *Stibitz v. General Pub. Util. Corp.*, 746 F.2d 993, 997 (3d Cir. 1984). Congress amended the Act to expand federal jurisdiction to include claims arising from any "nuclear incident." *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1096 (7th Cir. 1994).

The statute provides that federal district courts have original jurisdiction with respect to "any public liability action arising out of or resulting from a nuclear incident." 42 U.S.C. § 2210(n)(2). Cases brought in state courts "shall be

removed" to federal court. *Id.* "Public liability" in this statute means "any legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. § 2014(w). A "nuclear incident" was defined as any occurrence arising out of the hazardous properties of nuclear materials that causes sickness, personal injury or death:

> any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.

42 U.S.C. § 2014(q). I do not think there are any actions that can arise out of sickness or death resulting from the hazardous properties of nuclear material that are not Price-Anderson actions. That should be the end of the case, because the plaintiffs did not appeal the determination by the district court that Price-Anderson actions could not be asserted in tribal court.

Plaintiffs' claims for injury and death resulting from nuclear materials left over from uranium mining were Price-Anderson claims or nothing, and Price-Anderson claims must be brought in federal district court. Congress did not leave room for non-federal tribunals to interfere with nuclear development that Congress favored, or foster nuclear development it disfavored. Two circuits have held that the federal cause of action is exclusive. The Third Circuit stated:

> Congress clearly intended to supplant all possible state causes of action when the factual prerequisite of the statute are met . . . .

> Congress clearly considered the decisions of our court holding that Congress had not intended to create a federal cause of action for cases not based upon an extraordinary nuclear occurrence . . . . Congress then provided, in the [1988] Amendments Act, the clearest expression of intent that there be a federal cause of action arising directly under the Act.

In re TMI Cases Consolidated, 940 F.2d 832, 857 (3d Cir. 1991). The court concluded, "After the Amendments Act, no state cause of action based on public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all.*" *Id.* at 854 (emphasis in original). In *O'Conner v. Commonwealth Edison Co.,* 13 F.3d 1090 (7th Cir. 1994), the Seventh Circuit similarly held: "A claim growing out of any nuclear incident is compensable under [Price-Anderson] or it is not compensable at all." *O'Conner,* 13 F.3d at 1099.

The majority should not have reached over the head of the parties to reverse on a matter not even raised, whether prosecution of Price-Anderson claims in tribal court should have been enjoined.

Because (1) it is law of the case, not appealed, that the tribal court lacks jurisdiction over Price-Anderson claims, and (2) there are no claims that can be made that are not Price-Anderson claims, it necessarily follows that (3) there are no claims that can be made in tribal court. There can be no claim for which exhaustion in tribal court can be required.

We made a somewhat similar exhaustion doctrine mistake in *Burlington Northern Railroad Co. v. Red Wolf,* 106 F.3d 868 (9th Cir.), vacated 118 S. Ct. 37, 139 L. Ed. 2d 5 (1997). The Supreme Court made short work of our error, vacating it in a memorandum decision for further consideration in light of *Strate v. A-1 Contractors,* 117 S. Ct. 1404 (1997). The Court held in *Strate,* 117 S. Ct. 1404

(1997), that exhaustion in tribal court is not required, where "it is plain that no federal grant of authority provides for tribal governance of nonmembers' conduct":

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct . . . covered by [*Montana v. United States,*' 450 U.S. 544 (1981)] main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those claims. Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, must give way, for it would serve no purpose other than delay.

Id. 1416 n.14. The majority has in footnote 5 attempted to limit *Strate* to its facts, as we might with a poorly reasoned decision of our own that had not stood up well over time. We cannot do that with a Supreme Court decision.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EL PASO NATURAL GAS COMPANY,
a Delaware Corporation,
Plaintiff-Appellant,
v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE,
Defendants-Appellees.

No. 96-17121
DC No. CV-96-00049-RGS

CYPRUS FOOTE MINERAL COMPANY,
a Pennsylvania Corporation;
CYPRUS AMAX MINERAL COMPANY,
a Delaware Corporation,
Plaintiffs-Appellants,
v.

ZONNIE MARIE DANDY RICHARDS,
individually and as representative
of the Estate of Harold J.Richards, Sr.,
Defendant-Appellee.

No. 96-17139
DC No. CV-96-01524-RGS

Appeals from the United States District Court
for the District of Arizona

April 27, 1998

Before: Judges Harry Pregerson, Warren J. Ferguson, and Andrew J. Kleinfeld, Circuit Judges

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING EN BANC

The opinion filed on February 11, 1998 is amended as follows:

At Slip. Op. p. 1284, first full paragraph, lines 3-8:

Replace

"(2) tribal court jurisdiction "is patently violative of express jurisdictional prohibitions"; or (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribalcourt's jurisdiction. *National Farmers*, 471 U.S. 845 at 857 n.21 (emphasis added)."

with

"(2) tribal court jurisdiction patently would violate express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; or (4) no federal grant authorizes tribal governance of nonmembers' conduct on land covered by Montana's main rule. *See Strate v. A-1 Contractors*, U.S. , 117 S. Ct. 1404, 1416 n.14 (1997); *National Farmers*, 471 U.S. at 856 n.21."

At Slip Op. p. 1291, n.5, first full paragraph, lines 2-3:

Replace

"*Strate v. A-1 Contractors*, U.S. , 117 S. Ct. 1404 (1997)"

with

"*Strate*"

At Slip Op. p. 1291, n.5, first full paragraph, line 7:

Replace

"*Id.* at 1407-08."

with

"*Strate*, 117 S. Ct. at 1407-08."

With these amendments, Judges Pregerson and Ferguson voted to deny the petition for rehearing, Judge Pregerson voted to reject the suggestion for rehearing en banc and Judge Ferguson so recommends. Judge Kleinfeld voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 96-0049-PCT-RGS

EL PASO NATURAL GAS COMPANY, a Delaware Corporation,
Plaintiff,

v.

LAURA NEZTSOSIE and ARLINDA NEZTSOSIE,
Defendants.

Order Denying Plaintiff's Request for Preliminary Injunction and Granting Limited Injunction

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Transcript of Proceedings
May, 28, 1996

THE COURT: The plaintiff's application for preliminary injunction is denied to the extent that it in any way seeks to have this Court declare any aspect the jurisdiction of the Navajo tribal court. There is -- there is a set of differing views as to what this lawsuit involves. And when I say "this lawsuit," I mean the lawsuit brought by the defendants here as plaintiffs against El Paso Natural Gas in the tribal court.

The Navajo tribal court may or may not be presented with the issue of whether or not it has jurisdiction over all aspects of this case, that is to say this case should it include claims under the Price-Anderson Act as well as simply claims of negligence and other bases for a tort claim.

The Court does grant El Paso Natural Gas Company's requested relief to the extent that it enjoins the named defendants here, plaintiffs in the tribal court, from pursuing a Price-Anderson Act complaint in tribal Court. The Court's rationale for granting that limited aspect of the relief is application of the *National Farmer*'s three-factor test to the issues involved plus a consideration of the holdings in the case decided in this District Court in 1981, UNC Resources versus Benally.

In citing that case, I recognize that there are significant variations in the contacts, but taking the relevant analysis, the Court does that in supporting its limited grant of relief to the El Paso Natural Gas Company here by way of the preliminary injunction granted.

Now, I want it clear to the parties as to what is granted here and what is not granted here, and what the parties can and can't do in tribal court. The parties are enjoined from pursuing, as I said earlier, a cause of action in tribal court based upon the Price-Anderson Act for the reasons stated.

If the plaintiffs in that court want to, in effect, test the extent to which the Navajo tribal court believes it has jurisdiction, presumably it might be able to seek declaratory relief in that court from the tribal court as to its opinions as to its -- extent of its jurisdiction. And that is consistent with the Court's disinclination to in any way impede the jurisdiction of the tribal court in exploring its powers.

It is a case of importance in the sense that there's no doubt but what the operation of a facility on the -- on tribal lands that may affect a broad segment of tribal population from a health standpoint or otherwise is a matter of dramatic and significant concern to the tribe and to its government.

It is, of course, also true that the United States has a very strong and compelling interest to assure that it operates its nuclear industry in all of its varying facets in a manner that is uniformly appropriate for all who are exposed to both its benefits and its burdens. And because of the uniqueness of the geographic location of the sovereign tribal governments within the boundaries of the United States, it compounds this problem and, of course, also in part of that mix of complexity is the power, burden and responsibility of Congress to enact laws concerning the sovereign Indian nations within the United States.

It is the Court's belief that its ruling in this area preserves tribal sovereignty in its fullest measure, but at the same time recognizes the interests that have been argued concerning the nuclear industry, for lack of a better word, within the United States.

It's hoped that this will enable the parties to clarify the issue within the tribal court of its jurisdiction. It may be that it will conclude that on this narrow area it lacks jurisdiction or defers jurisdiction or is otherwise willing to permit claims to be adjudicated not in its own forum, or it may feel that clearly it does have it and if that's true, why then presumably there will be opportunities to test that decision within its own legal structure and there may be other occasions upon which that can be tested as well and in the United States District Court or in other courts.

I hope I've helped to clear and not muddy the waters that have been brought to me by this litigation.

Order

STRAND, Judge:

On May 28, 1996, plaintiff El Paso Natural Gas Company's application for a preliminary injunction of all tribal proceedings in the case of *Neztsosie v. El Paso Natural Gas Company*, Court of the Navajo Nation, District of Tuba City, Case No. TC-CV-0052-95, came on for hearing. After considering the parties' written motions, their supporting memoranda, and oral argument of counsel both at the hearing on May 28, 1996, and at a telephonic hearing regarding the wording of this order on July 11, 1996, this Court makes the following ruling pursuant to Federal Rule of Civil Procedure 65(d):

Plaintiff El Paso Natural Gas Company's Application for Preliminary Injunction is denied to the extent that it in any way seeks to have this Court rule on any aspect of jurisdiction of the Navajo tribal court. This Court denies El Paso Natural Gas Company's request for an injunction of tribal proceedings in *Neztsosie v. El Paso Natural Gas Company*, except to the extent that Laura and Arlinda Neztsosie seek relief based upon the Price-Anderson Act in tribal court. In all other respects, the relief sought by the plaintiff in its application for preliminary injunction is denied.

In reaching this decision, this Court relies on the principles of tribal sovereignty, the tribal exhaustion doctrine, the factors set forth in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), *UNC Resources, Inc. v. Benally*, 518 F.Supp. 1046 (D. Ariz. 1981), and on arguments and authorities presented by the parties in their papers and oral argument. In reaching this decision, the Court does not determine whether or not the provisions of the Price-Anderson Act have any application to the claims asserted by Laura and Arlinda Neztsosie in tribal court. It is further

ORDERED, approving cash bond in the amount of ONE THOUSAND and 00/100 DOLLARS ($1,000.00) in support of this injunction pursuant to Federal Rule of Civil Procedure 65(c).

SO ORDERED on this 3rd day of November, 1996.

Hon. Roger G. Strand
Judge of the United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 96-01524-PCT-RGS

CYPRUS FOOTE MINERALS COMPANY,
a Pennsylvania Corporation, et al.,
Plaintiffs,

v.

ZONNIE MARIE DANDY RICHARDS,
individually and as representative of
the Estate of Harold J. Richards, Sr.,
Defendant.

Order

Plaintiff has filed this action seeking an order enjoining Defendant from pursuing the lawsuit of *Zonnie Marie Dandy Richards (The State of Harold J. Richards, Sr., Deceased) v. Texas Zinc, et al.*, which is pending in the District Court of the Navajo Nation, Kayenta District, No. KY-CV-002-95. Plaintiffs have filed an application for preliminary injunctive relief. After considering the parties' pleadings, the Court makes the following ruling:

Plaintiffs' application for a preliminary injunction is denied to the extent that it seeks to have this Court decide whether the Navajo tribal court has jurisdiction over the case before it. Further, Plaintiffs' request for an injunction of the

tribal proceeding in *Zonnie Marie Dandy Richards (The State of Harold J. Richards, Sr., Deceased) v. Texas Zinc, et al.* is denied except to the extent that Defendant seeks relief under the Price-Anderson Act in tribal court.

The Court bases its decision on the principles of tribal sovereignty, the tribal exhaustion doctrine, the factors set forth in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046 (D. Ariz. 1981), and the additional authorities cited by the parties in their pleadings.

In reaching this decision, the Court does not determine whether or not the provisions of the Price-Anderson Act have any application to the claims asserted by Defendant in tribal court.

Accordingly,

IT IS ORDERED granting in part and denying in part Plaintiffs' Application for Preliminary Injunction (doc. #2).

FURTHER ORDERED approving a cash bond in the amount of ONE THOUSAND DOLLARS ($1000.00) in support of this injunction pursuant to Federal Rule of Civil Procedure 65(c).

DATED this 21st day of NOVEMBER, 1996.

[signed]

HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

APPENDIX E

The Atomic Energy Act, as amended by the Price-Anderson Act and the Price-Anderson Amendments Act, 42 U.S.C., provides in relevant part:

§ 2012. Congressional findings

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

. . .

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to

assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.

. . .

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

§ 2013. Purpose of chapter

It is the purpose of this chapter to effectuate the policies set forth above by providing for —

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject

to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to ~~enter~~ into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;

(e) a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit; and

(f) a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate.

§ 2014. Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

. . .

(q) The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material . . . .

. . .

(w) The term "public liability" means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation), except: (i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in subsections (a), (c), and (k) of section 2210 of this title, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity, where the nuclear incident occurs. . . .

. . .

(hh) The term "public liability action", as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

. . .

§ 2210. Indemnification and limitation of liability

. . .

(e) Limitation on aggregate public liability

(1) The aggregate public liability for a single nuclear incident of persons indemnified, including such legal costs as are authorized to be paid under subsection o.(1)(D), shall not exceed -

(A) in the case of facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the maximum amount of financial protection required of such facilities under subsection b. (plus any surcharge assessed under subsection o.(1)(E));

(B) in the case of contractors with whom the Secretary has entered into an agreement of indemnification under subsection d., the maximum amount of financial protection required under subsection b. or the amount of indemnity and financial protection that may be required under paragraph (3) of subsection d., whichever amount is more; and

(C) in the case of all licensees of the Commission required to maintain financial protection under this section -

(i) $500,000,000, together with the amount of financial protection required of the licensee; or

(ii) if the amount of financial protection required of the licensee exceeds $60,000,000, $560,000,000 or the amount of financial protection required of the licensee, whichever amount is more.

(2) In the event of a nuclear incident involving damages in excess of the amount of aggregate public liability under paragraph (1), the Congress will thoroughly review the particular incident in accordance with the procedures set forth in section 170 i. and will in accordance with such procedures, take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims resulting from a disaster of such magnitude.

(3) No provision of paragraph (1) may be construed to preclude the Congress from enacting a revenue measure, applicable to licensees of the Commission required to maintain financial protection pursuant to section b., to fund any action undertaken pursuant to paragraph (2).

(4) With respect to any nuclear incident occurring outside of the United States to which an agreement of indemnification entered into under the provisions of subsection d. is applicable, such aggregate public liability shall not

exceed the amount of $100,000,000, together with the amount of financial protection required of the contractor.

. . .

(h) Conditions of agreements of indemnification

The agreement of indemnification may contain such terms as the [Nuclear Regulatory] Commission or the Secretary [of Energy], as appropriate, deems appropriate to carry out the purposes of this section. Such agreement shall provide that, when the Commission or the Secretary, as appropriate, makes a determination that the United States will probably be required to make indemnity payments under this section, the Commission or the Secretary, as appropriate, shall collaborate with any person indemnified and may approve the payment of any claim under the agreement of indemnification, appear through the Attorney General on behalf of the person indemnified, take charge of such action, and settle or defend any such action. The Commission or the Secretary, as appropriate, shall have final authority on behalf of the United States to settle or approve the settlement of any such claim on a fair and reasonable basis with due regard for the purposes of this chapter. Such settlement shall not include expenses in connection with the claim incurred by the person indemnified.

. . .

(n) Waiver of defenses and judicial procedures

(1) With respect to any extraordinary nuclear occurrence to which an insurance policy or contract furnished as proof of financial protection or an indemnity agreement applies and which -

(A) arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility,

(B) arises out of or results from or occurs in the course of transportation of source material, byproduct material, or special nuclear material to or from a production or utilization facility,

(C) during the course of the contract activity arises out of or results from the possession, operation, or use by a Department of Energy contractor or subcontractor of a device utilizing special nuclear material or byproduct material,

(D) arises out of, results from, or occurs in the course of, the construction, possession, or operation of any facility licensed under section 53, 63, or 81, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection a.,

(E) arises out of, results from, or occurs in the course of, transportation of source material, byproduct material, or special nuclear material to or from any facility licensed under section 53, 63, or 81, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection a., or

(F) arises out of, results from, or occurs in the course of nuclear waste activities.[8]

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[8] So in original. Probably should be a comma.

the Commission or the Secretary, as appropriate, may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. When so incorporated, such waivers shall be judicially enforceable in accordance with their terms by the claimant against the person indemnified. Such waivers shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages, nor shall such waivers apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant. The waivers authorized in this subsection shall, as to indemnitors, be effective only with respect to those obligations set forth in the insurance policies or the contracts furnished as proof of financial protection and in the indemnity agreements. Such waivers shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (i) the terms of insurance policies or contracts furnished as proof of financial protection, or indemnity agreements, and (ii) the limit of liability provisions of subsection e.

(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United

States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission, or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. . . .

(3)(A) Following any nuclear incident, the chief judge of the United States district court having jurisdiction under paragraph (2) with respect to public liability actions (or the judicial council of the judicial circuit in which the nuclear incident occurs) may appoint a special caseload management panel (in this paragraph referred to as the "management panel") to coordinate and assign (but not necessarily hear themselves) cases arising out of the nuclear incident, if --

(i) a court, acting pursuant to subsection (o) of this section, determines that the aggregate amount of public liability is likely to exceed the amount of primary financial protection available under subsection (b) of this section (or an equivalent amount in the case of a contractor indemnified under subsection (d) of this section); or

(ii) the chief judge of the United States district court (or the judicial council of the judicial circuit) determines that cases arising out of the nuclear incident will have an unusual impact on the work of the court.

(B)(i) Each management panel shall consist only of members who are United States district judges or circuit judges.

(ii) Members of a management panel may indicate any United States district judge or circuit judge of another district court or court of appeals, if the chief judge of such other district court or court of appeals consents to such assignment.

(C) It shall be the function of each management panel --

(i) to consolidate related or similar claims for hearing or trial;

(ii) to establish priorities for the handling of different classes of cases;

(iii) to assign cases to a particular judge or special master;

(iv) to appoint special masters to hear particular types of cases, or particular elements or procedural steps of cases;

(v) to promulgate special rules of court, not inconsistent with the Federal Rules of Civil Procedure, to expedite cases or allow more equitable consideration of claims;

(vi) to implement such other measures, consistent with existing law and the Federal Rules of Civil Procedure, as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident; and

(vii) to assemble and submit to the President such data, available to the court, as may be useful in estimating the aggregate damages from the nuclear incident.

. . .

(s) Limitation on punitive damages

No court may award punitive damages in any action with respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident or evacuation.